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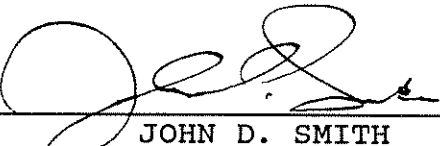
CALIFORNIA OFFICE OF ADMINISTRATIVE LAW
SACRAMENTO, CALIFORNIA

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MARCH FONG EU
SECRETARY OF STATE
OF CALIFORNIA

In re:) 1990 OAL Determination No. 3
Request for Regulatory)
Determination filed by) [Docket No. 89-009]
Robert M. Rogers)
regarding the Board of) February 8, 1990
Registration for)
Professional Engineers) Determination Pursuant to
and Land Surveyors') Government Code Section
policy prohibiting fire) 11347.5; Title 1, California
protection engineers from) Code of Regulations,
performing design) Chapter 1, Article 2
services')
)

Determination by:



JOHN D. SMITH
Chief Deputy Director/General Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not the Board of Registration for Professional Engineers and Land Surveyors' policy of prohibiting fire protection engineers from (1) performing design services, and (2) designing fire protection systems, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law has concluded that the Board's policy, as set out above, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

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THE ISSUE PRESENTED ²

The Office of Administrative Law ("OAL") has been requested to determine³ whether or not the Board of Registration for Professional Engineers and Land Surveyors' ("Board") policy prohibiting fire protection engineers from (1) performing design services, and (2) designing fire protection systems is a "regulation" required to be adopted pursuant to the Administrative Procedure Act.⁴

THE DECISION ^{5, 6, 7, 8, 9}

OAL finds that the Board's policy prohibiting fire protection engineers from (a) performing design services, and (b) designing fire protection systems,

(1) is required to be adopted pursuant to the Administrative Procedure Act ("APA");

(2) is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) is not exempt from the requirements of the APA; and therefore

(4) violates Government Code section 11347.5, subdivision (a).

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R E A S O N S F O R D E C I S I O N

I. AGENCY; AUTHORITY; BACKGROUND

Agency

The Board of Registration for Professional Engineers and Land Surveyors ("Board") is under the jurisdiction of the Department of Consumer Affairs.¹⁰

In 1929, the Legislature created the State Board of Registration for Civil Engineers.¹¹ Through the next several decades, the Legislature renamed the Board and expanded the scope of the original Board's powers to oversee not only civil engineers but other professional engineers as well. In 1983, the Board was given its current name.¹² As enumerated in the Professional Engineers Act,¹³ the Board is responsible for the registration, certification, and oversight of professional engineers in California.

The Board's regulations are set out in Title 16, California Code of Regulations ("CCR"), Chapter 5, sections 400-471.

Authority ¹⁴

The Board has been granted general rulemaking authority by Business and Professions Code section 6716, which states in part:

"The board may adopt rules and regulations consistent with law and necessary to govern its action. These rules and regulations shall be adopted in accordance with the provisions of the [APA]. . . ." [Emphasis added.]

Background

To facilitate better understanding of the issues presented in this Determination, we set forth the following relevant statutes and regulations, and undisputed facts.

Business and Professions Code section 6701 contains the following definition:

"'Professional engineer' within the meaning and intent of this [Professional Engineers Act], refers to a person engaged in the professional practice of rendering service or creative work requiring education, training and experience in engineering sciences and the application of special knowledge of the mathematical, physical and engineering sciences in such professional

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or creative work as consultation, investigation, evaluation, planning or design of public or private utilities, structures, . . . buildings, equipment or projects, and supervision of construction for the purpose of securing compliance with specifications and design for any such work." [Emphasis added.]

After reviewing the Request, the 25 public comments received, and the Board's Response, there appear to us to be two unofficially recognized categories of engineers: "practice engineers" and "title engineers."¹⁵ As far as we can tell, the names of these categories come from language in certain sections of the Professional Engineers Act. For example, Business and Professions Code sections 6702, 6702.1 and 6702.2 define civil, electrical and mechanical engineer, respectively. Each definition contains the language: "one who practices or offers to practice." (Emphasis added.) In comparison, section 6704 contains the following language: "according to registration with the board the engineering branch titles." (Emphasis added.)

The "practice engineers" category includes only civil, electrical, and mechanical engineers. The scope of practice of each of these engineers, which is defined in either statute or regulation,¹⁶ includes design services.

The "title engineers" category includes agricultural, chemical, control system, corrosion, fire protection, industrial, manufacturing, metallurgical, nuclear, petroleum, quality, safety, and traffic engineers. The scope of practice of each of these engineers is defined in the Board's regulations--Title 16, CCR, section 404, subsections (a) through (gg). For purposes of this determination proceeding, we are concerned with only fire protection engineers ("FPE") and the scope of their practice. We note, however, that the definition of five of the "title engineers"--agricultural, chemical, industrial, nuclear and petroleum--includes the performance of design services.

Title 16, CCR, subsection 404(n) defines "Fire protection engineering" as

"that branch of professional engineering which requires such education and experience as is necessary to understand the engineering problems relating to the safeguarding of life and property from fire and fire-related hazards; and requires the ability to apply this knowledge to the identification, evaluation, correction, or prevention of present or potential fire and fire related panic hazards in buildings, groups of buildings, or communities, and to recommend the arrangement and use of fire resistant building materials and fire detection and extinguishing systems,

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devices, and apparatus in order to protect life and property. The above definition of fire protection engineering shall not be construed to permit the practice of civil, electrical, or mechanical engineering." [Emphasis added.]

Business and Professions Code section 6704 provides in part:

"In order to safeguard life, health, property, and public welfare, no person shall practice civil, electrical, or mechanical engineering unless appropriately registered . . . under this chapter [the Professional Engineers Act] and only persons registered under this chapter shall be entitled to take and use the titles 'consulting engineer,' 'professional engineer,' or 'registered engineer,' . . . and according to registration with the board the engineering branch titles specified in Section 6732" [Emphasis added.]

The "engineering branch titles," specified in section 6732 are the ones listed above in the "title engineer" category. Section 6732 prohibits anyone other than a registered professional engineer from

"stamp[ing] or seal[ing] any plans, specifications, plats, reports, or other documents with the seal or stamp of a professional engineer, or . . . in any manner [using] the title 'professional engineer,' 'registered engineer,' or 'consulting engineer,' or any of the following branch titles: . . . 'fire protection engineer,' . . . unless registered hereunder."

Background: This Determination

In a letter dated January 23, 1989, Robert M. Rogers (the "Requester") wrote to William C. Rupp, President of the Board, alleging that during 1988 the Board's

"Executive Secretary [had] addressed several professional organizations and engineering societies which [the Requester had attended]. At such occasions, she has stated that registered Professional Engineers, in disciplines other [than] 'practice disciplines,' i.e. Civil, Mechanical or Electrical are not authorized to practice engineering as provided for by Sections 6700, 6701, 6717 and 6732 of the 'Professional Engineers Act.' Further, that such engineers may not render design services or perform other creative work, as that is considered restricted to the statutory 'practice' disciplines."

Mr. Rogers further requested of the Board: "Specifically, I want to be assured that the Executive Secretary has been

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speaking with the knowledge, consent and under the authority of the Board" He further inquired that if the Board's policy is as stated by the Executive Secretary, then would the Board provide the statutory and/or regulatory law or authority for such a policy.

Mr. Rupp responded to Mr. Rogers' allegations in a letter dated February 3, 1989, stating that

"The information provided to you by our Executive Officer seems to be correct and consistent with Board policy and statute. The relationship between the so called 'practice act branches' . . . and the 'title act branches' . . . is spelled out in the statutes and in the Board rules. . . . The basic authorization for registration in the practice branches and the title branches is contained in Section 6704 of the Business and Professions (B & P) code, and the practice provisions are further reinforced by Section 6730 of that code. Moreover, Section 6717 of the B & P code authorizes the Board to define the scope of practice of each branch of engineering other than civil engineering.

"The Board has interpreted this statutory scheme to mean that out of all of the different areas of engineering specialization which exist, the practice or offer to practice in the three areas of civil, electrical, and mechanical engineering is restricted to persons so registered (or to persons exempt) and that no person either unregistered or registered only in a title discipline may perform or offer to perform tasks included within those defined areas of practice. Thus the Board . . . has specifically indicated in the definitions of the title branches as contained in Title 16, Chapter 5, Rule 404 [of the CCR], that each such title branch does not contain authorization to practice the areas covered by the branches of Civil, Electrical, and/or Mechanical Engineering. You will also note that the word 'design' does not appear in the definition of title disciplines except for Agricultural, Chemical, Industrial, Nuclear, and Petroleum engineering, but does appear in the practice branch definitions. This is because there is usually sufficient overlap between the title branches and the practice branches so that any design work relating to a title branch would fall under the provisions of one of the practice branches.

"Based upon commonly accepted custom, the Board has construed the word 'design' to mean the production of plans, specifications, and reports, and thus these are restricted to the practice branches. This restriction does not apply, however, to other creative work such as planning, research, and consultation in the areas

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covered by the title branches. . . ." [Emphasis added.]

On May 10, 1989, Robert M. Rogers submitted to OAL a Request for Determination regarding

"whether the policy of the Board precluding Fire Protection Engineers from performing . . . design services [related to fire detection, fire sprinkler, fire suppression and other fire extinguishing systems] is a 'regulation' required to be promulgated in accordance with the [APA]."

In addition to attaching the two letters set forth above as examples of the challenged state agency policy, the Requester included a copy of a publication titled State Fire Marshal's Ad-Hoc Committee with the Contractors State License Board, One-Day Seminar (Handout). This undated publication contains a letter, dated April 4, 1986, addressed to Harry Hilt, Executive Officer of the Board at that time, from Steve Hart, Fire Marshal. The letter is in a "question/answer" format. The letter states that "The answers given in this letter were researched by Mr. Warren F. Holman, Program Manager for the [Board]. . . ."

In particular, the Requester cites to page 2, question #4, of the handout, which states:

"Question #4

"A. What can a professional engineer design when he/she is classified in the category of Fire Protection Engineer?

ANSWER: 'FIRE PROTECTION ENGINEERS ARE NOT PERMITTED TO DO DESIGN WORK. (See [Tit. 16, CCR] 404(n).)'

"B. Are there any other professional engineer classified categories who can legally design fire protection systems, such as automatic fire sprinkler systems, fire extinguishing systems, etc?

ANSWER: 'YES, AS FOLLOWS:
1. MECHANICAL ENGINEER (plumbing)
2. ELECTRICAL ENGINEER (electrical)
3. CIVIL ENGINEER (all of the above)'"

[Underlining in original.]

On November 10, 1989, OAL published a summary of this Request for Determination in the California Regulatory

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Notice Register, along with a notice inviting public comment.¹⁷

On December 26, 1989, the Board filed a Response to the Request with OAL. The Board summarized its position regarding the Request as follows:

" . . . The board acknowledges that the communications in question were ambiguous in that they could have been interpreted to mean that a FPE may not render design services in areas other than civil, electrical or mechanical engineering and to stamp such plans. Such a result was not the board's intent, and it acknowledges that a FPE can perform design services in areas other than civil, electrical or mechanical engineering and that a FPE may stamp and seal such plans. However, the conclusion that a FPE may not design and stamp plans for a fire sprinkler system is not an underground regulation. It is a restatement of existing law which provides that a FPE may not practice civil, electrical or mechanical engineering (Section 404(n)) coupled with the fact that the practice of mechanical engineering, as defined by section 404(u), includes the design of plumbing systems such as a fire sprinkler system. Further, it is clear that under existing law a FPE is prohibited from performing design services in areas which constitute the practice of civil, electrical or mechanical engineering. Such a declaration is not an underground regulation, but is again a restatement of existing statute and regulations."

II. ISSUES

After reviewing the Request and the challenged documents attached, the public comments and the Board's Response, there appears to be some need for clarification of precisely which Board policy is under attack here. We have determined that the challenged Board policy contains two rules:

RULE NO. 1 (GENERAL CHALLENGED RULE): THE BOARD'S POLICY THAT FIRE PROTECTION ENGINEERS MAY NOT PERFORM DESIGN SERVICES.

RULE NO. 2 (SPECIFIC CHALLENGED RULE): THE BOARD'S POLICY THAT FIRE PROTECTION ENGINEERS MAY NOT PERFORM DESIGN SERVICES AS THEY RELATE TO FIRE PROTECTION SYSTEMS, I.E., FIRE SPRINKLER SYSTEMS, BECAUSE SUCH DESIGN SERVICES ARE CONSIDERED TO FALL WITHIN THE SCOPE OF PRACTICE OF CIVIL, ELECTRICAL OR MECHANICAL ENGINEERS.

We therefore will address the challenged policy as two separate rules for purposes of this determination

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proceeding. We will not address the merits of the Board's policy that FPEs may or may not perform design services or design fire protection systems, such as, fire sprinkler systems, as that is outside the scope of OAL's authority.¹⁸

Having established that there are two challenged rules, we note that there are three main issues before us:¹⁹

- (1) WHETHER THE APA IS APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.
- (2) WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.
- (3) WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS APPLICABLE TO THE BOARD'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to all state agencies, except those in the "judicial or legislative departments."²⁰ Since the Board is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to that agency.²¹

Additionally, Business and Professions Code section 6716 provides that

"The board may adopt rules and regulations consistent with the law and necessary to govern its action. These rules and regulations shall be adopted in accordance with the provisions of the [APA]."

We are aware of no statutory exemption which would permit the Board to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES ARE "REGULATIONS" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

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Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['regulation'] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA]" [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b), involves a two-part inquiry:

First, is the challenged rule either

- o a rule or standard of general application or
- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

The answer to the first part of the inquiry is "yes." For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.²² The rules challenged in this Request apply to all fire protection engineers statewide, and therefore, are rules of general application.

In regards to both challenged rules, the answer to the second part of the inquiry is also "yes." We will analyze each challenged rule separately.

Analysis of Rule No. 1: Fire Protection Engineers May Not Perform Design Services

Business and Professions Code section 6701 defines "Professional engineer" as a

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"person engaged in the professional practice of rendering service or creative work requiring education, training and experience in engineering sciences and the application of special knowledge of the mathematical, physical and engineering sciences in such professional or creative work as . . . planning or design of public or private utilities, structures, machines, processes, circuits, buildings, equipment or projects . . ." [Emphasis added.]

Business and Professions Code section 6704 provides that "no person shall practice civil, electrical, or mechanical engineering unless appropriately registered or specifically exempted from registration under this chapter" (Emphasis added.)

In its letter, dated February 3, 1989, the Board stated that "Based upon commonly accepted custom, the Board has construed the word 'design' to mean the production of plans, specifications, and reports, and thus these activities are restricted to the practice branches." (Emphasis added.) In the publication handed out at the seminar, in its answer to Question No. 4, the Board stated that "Fire Protection Engineers are not permitted to do design work."

The challenged policy or rule (Rule No. 1) stated in the Board's letter and in the answer to Question No. 4, implements, interprets or makes specific Business and Professions Code section 6701, quoted above, which defines "Professional engineer."

A fire protection engineer clearly falls within the definition of "Professional engineer." Section 6704 provides that fire protection engineers may use the title "professional engineer," and Title 16, CCR, subsection 404(n) defines "Fire protection engineering" as "that branch of professional engineering . . ." (Emphasis added.) ~~Subprofessional engineering~~ that "Professional engineering" within the meaning of this chapter [chapter 5, Title 16, CCR] comprises the following branches: . . . fire protection engineering"

By defining the term "design," as used in section 6701, to mean "the production of plans, specifications, and reports," and restricting these activities to the practice branches i.e., civil, electrical and mechanical, the Board is implementing, interpreting or making specific the definition of "Professional engineer" as set forth in section 6701.

The challenged Board policy further implements, interprets or makes specific section 6704, which prohibits any person from practicing civil, electrical or mechanical engineering unless appropriately registered. By limiting the performance of design services to the practice of civil,

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electrical, and mechanical engineering, the Board is basically stating that it is unlawful for any person to render design services unless he or she is registered as a civil, electrical or mechanical engineer. Thus, the challenged policy expands or adds to section 6704.

The challenged policy also implements section 6717 which authorizes the Board to, "by regulation, define the scope of each branch of professional engineering other than civil engineering" and section 6716, which states "The board may adopt rules and regulations consistent with law and necessary to govern its action. . . ."

Rule No. 1, therefore, is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b).²³

Analysis of Rule No. 2: Fire Protection Engineers May Not Perform Design Services As They Relate To Fire Protection Systems, i.e., Fire Sprinkler Systems, Because Such Design Services Are Considered To Fall Within The Scope of Practice Of Civil, Electrical Or Mechanical Engineers

We agree with the Board's statement that, FPE's may not perform a service that falls within the practice of civil, electrical or mechanical engineering unless the FPE is also registered as a civil, electrical or mechanical engineer. This is merely a restatement of Business and Professions Code section 6704 and Title 16, CCR, subsection 404(n). However, we are aware of no statute or regulation which states that the design of fire protection systems may be rendered by only civil, electrical or mechanical engineers. Thus, we cannot agree with the Board's argument that the challenged rule (Rule No. 2) is merely a restatement of existing law.

We therefore find that Rule No. 2, set forth above, also implements, interprets or makes specific Business and Professions Code sections 6701, 6704, 6716 and 6717 for the same reasons as stated above under the analysis of Rule No. 1.

Rule No. 2 (as well as Rule No. 1) interprets or makes specific Title 16, CCR, subsection 404(n), which defines "fire protection engineering." This definition does not specifically prohibit FPEs from designing fire protection systems.

Rule No. 2, therefore, is a "regulation" as defined in Government Code section 11342, subdivision (b).

WE THEREFORE CONCLUDE that the challenged Board policy that: (1) FPEs are not permitted to do design work, and (2) that FPEs may not design fire protection systems, such as, fire

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sprinkler systems, because it falls within the scope of practice of civil, electrical or mechanical engineers, is a "regulation" as defined in Government Code section 11342, subdivision (b).

THIRD, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

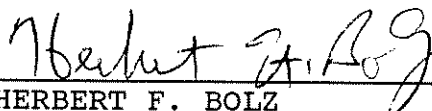
Generally, all "regulations" issued by state agencies are required to be adopted pursuant to the APA, unless they have been expressly exempted by statute from the application of the APA.²⁴ Rules concerning certain activities of state agencies--for instance, "internal management"--are not subject to the procedural requirements of the APA.²⁵ However, none of the recognized exceptions (set out in note 25) apply to either of the challenged rules.

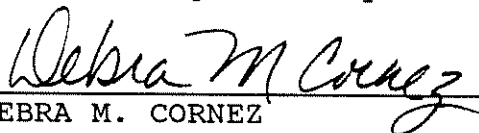
III. CONCLUSION

For the reasons set forth above, OAL finds that the Board's policy prohibiting fire protection engineers from (a) performing design services, and (b) designing fire protection systems,

- (1) is required to be adopted pursuant to the APA;
- (2) is a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);
- (3) is not exempt from the requirements of the APA; and therefore
- (4) violates Government Code section 11347.5, subdivision (a).

DATE: February 8, 1990


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1. This Request for Determination was filed by Robert M. Rogers, 60 Pamela Court, Tiburon, CA 94920, (415) 442-6607. The Board of Registration for Professional Engineers and Land Surveyors (1428 Howe Avenue, Suite 56, Sacramento, CA 95825-3298, (916) 920-7466) was represented by Donald Chang, Staff Counsel, Department of Consumer Affairs, 1020 "N" Street, Sacramento, CA 95814, (916) 322-5252.

To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "67" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

Since August 1989, the following authorities have come to light:

(1) Los Angeles v. Los Olivas Mobile Home P. (1989) __ Cal.App.3d __, 262 Cal.Rptr. 446, 449, citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved; the Second District Court of Appeal refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

"'Determination' means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]."
[Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a [']regulation['] as defined in subdivision (b) of Section 11342,

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unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

- "(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.
- "(c) The office shall do all of the following:
1. File its determination upon issuance with the Secretary of State.
 2. Make its determination known to the agency, the Governor, and the Legislature.
 3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.
 4. Make its determination available to the public and the courts.
- "(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.
- "(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:
1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.
3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a ['']regulation[''] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

5. Reflecting OAL's special expertise in deciding whether or not particular agency rules are subject to California APA requirements, regulatory determinations issued pursuant to Government Code section 11347.5 are--for five reasons--entitled to great weight in judicial proceedings.

First, Government Code section 11347.5, subdivision (e), provides that OAL determinations shall not be considered by a court if a combination of three specified conditions is present. Clearly, the Legislature envisioned that determinations would be considered by the court in all other circumstances. Though the statute does not specify the weight that should be given the determination, it is apparent that the Legislature envisioned and intended that courts would give determinations appropriate consideration.

Noteworthy by its absence from Government Code section 11347.5 is any provision for enforcement of the determination by OAL; clearly, it was intended that a citizen unable to obtain voluntary agency compliance with an OAL determination would need to seek judicial relief. A review of pertinent legislative history documents indicates that the basic idea behind the statute was that the OAL determination process would encourage voluntary APA compliance by focusing intense publicity on the rulemaking agency. Thus, while there is no support in the statute for the proposition that determinations are legally binding, it is difficult to argue that the Legislature intended that OAL determinations be given anything less than the "great weight" traditionally accorded the interpretation of a statute by the agency charged with its enforcement. See Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94. Clearly, OAL is the agency charged with the enforcement of Government Code section 11347.5.

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Second, the Legislature's special concern that OAL determinations be given appropriate weight in the judicial context is evidenced by the directive contained in Government Code section 11347.5, subdivision (c)(4): that OAL shall "[m]ake its determination available to . . . the courts." [Emphasis added.]

Third, an official legislative analysis of the implementation of Government Code section 11347.5 explicitly states that OAL is the state agency with "statewide expertise" in regulatory matters and is the appropriate agency to administer Government Code section 11347.5 because the administering agency must "enforce regulatory discipline on state departments." [Emphasis added.] [The quoted language is from the "Analysis of the Budget Bill: For the Fiscal Year July 1, 1985 to June 30, 1986," prepared by the Legislative Analyst for the Joint Legislative Budget Committee, dated February 27, 1985, p. 1607.] Responding to a request from the Legislature that the option of transferring responsibility for implementation of Government Code section 11347.5 from OAL to the Department of Justice (DOJ) be evaluated, the Legislative Analyst recommended that OAL continue to administer the program. The passage from the analysis in which the language quoted above appeared reads as follows:

"Our review indicates that transfer of the AB 1013 program is not warranted on programmatic grounds, for two reasons. First, we believe this program is best managed by a control agency [other "control agencies" are the Department of Finance and the Department of General Services, which provide central oversight of state agencies in the areas of budget and contracts, respectively] having both oversight and managerial experience. Our analysis indicates that these attributes are appropriate because the implementation of the AB 1013 [Government Code section 11347.5] program requires the administering agency in effect to enforce regulatory discipline on state departments. The OAL currently performs control agency functions; the DOJ--which is basically a client- or service-oriented agency--generally does not.

Second, transfer of the program would result in an unnecessary duplication of state resources. Currently, statewide expertise in the drafting, review, and screening of regulations rests with OAL. If the AB 1013 program were transferred to the DOJ, departments would have to deal with two separate state agencies on the same set of regulations. Under such a bifurcated system, there would have to be some duplication of

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expertise among the agencies. There would also be the potential for disagreement between the two agencies as to how informal regulations should be interpreted." [Emphasis added.]

Fourth, OAL issued the first regulatory determination in April 1986 (after the quoted Legislative Analyst report was issued) and has as of January 31, 1990, issued 68 formal determinations. Thus, in the nearly four years since the legislative report was submitted, OAL has substantially increased its familiarity with the legal issue of whether or not an uncodified agency rule is an underground regulation.

Fifth, since April 1986, the Regulatory Determination Program has attained a high degree of acceptance in the legal community. This acceptance is demonstrated by the identity of some of the persons who (1) have submitted requests for determination or (2) have commented on pending requests. [This category does not include agencies simply responding to charges that rules issued by them were illegal.]

Focusing on the public sector, these persons include State Senator Nicholas Petris, Assemblyman Gil Ferguson, Lieutenant Governor Leo McCarthy, Assemblyman Byron Sher, State Senator William Craven, the Department of Personnel Administration, the Department of Consumer Affairs, CalTrans, the Resources Agency, the San Francisco Bay Conservation and Development Commission, the City of Hollister, the City of Walnut Creek, and the United States Department of the Interior. Especially noteworthy public sector participants are two state agencies, the State Building Standards Commission and the State Historical Building Code Board, which filed requests attacking alleged underground regulations issued by other state agencies.

Focusing on the private sector, entities actively participating in the Regulatory Determinations Program include the Pacific Gas and Electric Company, the Dow Chemical Company, the Sierra Club, the Environmental Defense Fund, the California Chamber of Commerce, the California Taxpayers Association, the California Restaurant Association, the Legal Aid Societies of Marin and San Mateo County, Chevron USA Inc., Protection and Advocacy, Inc., the Pacific Legal Foundation, several labor unions, and numerous private citizens.

6. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rule-making agencies but also all interested parties to submit written comments on pending requests for regulatory

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determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "under-ground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

OAL received public comments on this Request for Determination from the following 25 people:

1. Gerald W. O'Rourke, P.E., c/o Schirmer Engineering Corporation, 3250 Wilshire Blvd., Ste. 930, Los Angeles, CA 90010
2. Richard W. Weitzel, P.E., 904 Highland Drive, Laurinburg, North Carolina 28352
3. William L. Hanbury, P.E., 492 N. Owen Street, Alexandria, VA 22304
4. Patrick C. Ward, P.E., 1789 Northstar Drive, Petaluma, CA 94954
5. James W. Gatherer, Jr., P.E., Schirmer Engineering Corp., 2861 Brackenwood Drive, Lithonia, GA 30058
6. Deborah L. Freeland, P.E., (President, Southern California Chapter Society of Fire Protection Engineers, Johnson & Higgins, One Century Plaza, 2029 Century Park East, Los Angeles, CA 90067
7. Cheryl L. Domnitch, P.E., Bureau of Fire Prevention, San Jose Fire Dept, 4 North Second St., Ste. 1100, San Jose, CA 95113-1305
8. David H. Brown, P.E., President, Northern Calif. - Nevada Chapter, Society of Fire Protection Engineers, c/o Protection Mutual, 353 Sacramento Street, Ste. 1840, San Francisco, CA 94111
9. Gilbert G. Bendix, P.E., Bendix Environmental Research, Inc., Fox Plaza, Ste. 418, 1390 Market Street, San Francisco, CA 94102
10. Homer H. Wallace, Regional Chief Engineer, Western Region, Factory Mutual Engineering, 333 City Blvd., Ste. 1500, P. O. Box 5409 Orange, CA 92613
- ✓ 11. Timothy Callahan, Esq., P.E., 2251 Colonial Court, Walnut Creek, CA 94598

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12. Kenneth J. Long, P.E., 2162 Granite Drive, Alamo, CA 94507
13. Glenn D. Peterson, P.E.
14. Samuel W. Nay, S.W. Nay Associates, Registered Consultants, P. O. Box 4663, Glendale, CA 91222
15. Carol A. Caldwell, P.E.
16. Bert L. Atwood, P.E., Assistant Vice President - Engineering, Frank B. Hall & Co. of California, Northern Division, 200 Pringle Avenue, Ste. 400, P. O. Box 8053, Walnut Creek, CA 94596-8053
17. James M. Feld, P.E., 2791 F. North Texas Street, Ste. 271, Fairfield, CA 94533
18. James B. Orr, P.E., 4 Garden Drive, Kensington, CA 94708-1019
19. Chester W. Schirmer, P.E., President, Schirmer Engineering Corp., 707 Lake Cook Road, Deerfield, IL 60015-4997
20. Paul D. Smith, P.E., 19 Almenar Drive, Greenbrae, CA 94904
21. Craig V. Mayer, 2903 Liberty Drive, Pleasanton, CA 94566
22. Leo Garcia, P.E., Life/Fire Safety Engineering Consultants, 2700 Pennsylvania Avenue, Santa Monica, CA 90404
23. Gene A. Childs, P.E., c/o FM Engineering, 1000 Fourth Street, San Rafael, CA 94901
24. Dhun Engineer, c/o Arkwright Mutual Insurance Co., 1875 S. Grant, Ste. 800, San Mateo, CA 94403
25. Warren D. Bonisch, c/o Schirmer Engineering Corp., 803 West Broad Street, Falls Church, VA 22046

All of the above-noted correspondence that were timely received were considered in rendering this Determination.

7. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by

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incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

8. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for \$3.00.

10. Business and Professions Code section 6710.
11. Statutes of 1929, chapter 801, page 1645, section 2.
12. Stats. of 1983, c. 150, sec. 4., (Business and Professions Code section 6710.)
13. Business and Professions Code, chapter 7, sections 6700-6799.
14. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine

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whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

15. These two categories are also referred to as "practice act disciplines" or "practice act branches," and "title act disciplines" or "title act branches" respectively.
16. Business and Professions Code section 6702 defines "civil engineer" as meaning "a professional engineer in the branch of civil engineering and refers to one who practices or offers to practice civil engineering in any of its phases."

Business and Professions Code section 6731 defines "civil engineering" as

"embrac[ing] the following studies or activities in connection with fixed works for irrigation, drainage, waterpower, water supply, flood control, . . . railroads, highways, tunnels, airports and airways, . . . homogeneous structure, buildings, or bridges:

- (a) The economics of, the use and design of, materials of construction and the determination of their physical qualities.

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- (e) The preparation or submission of designs, plans and specifications and engineering reports.

". . . ." [Emphasis added.]

Business and Professions Code section 6702.1 defines "electrical engineer" as "a professional engineer in the branch of electrical engineering and refers to one who practices or offers to practice electrical engineering in any of its phases."

Title 16, CCR, subsection 404(1) defines the scope of "electrical engineering" as "embrac[ing] studies or activities relating to the generation, transmission, and utilization of electrical energy, including the design of electrical, electronic and magnetic circuits and the technical control of their operation and of the design of electrical gear. It is concerned with research, organizational, and economic aspects of the above."

Business and Professions Code section 6702.2 defines "mechanical engineer" as "a professional engineer in the branch of mechanical engineering and refers to one who practices or offers to practice mechanical engineering in any of its phases."

Title 16, CCR, subsection 404(u), defines the scope of "mechanical engineering" as "deal[ing] with engineering problems relating to generation, transmission, and utilization of energy in the thermal or mechanical form and also with engineering problems relating to the production of tools, machinery, and their products and to heating, ventilation, refrigeration and plumbing. It is concerned with the research, design, production, operational, organizational, and economic aspects of the above."

- 17. California Regulatory Notice Register 89, No. 45-Z, p. 3165.
- 18. We also will not address whether the Board's definition of a "fire sprinkler system" as "a specialized version of a standard indoor plumbing system . . . [t]herefore, the design of fire sprinkler systems constitutes the practice of mechanical engineering and a FPE is not authorized to design such a system," is an underground regulation; this definition appears in the Board's Response (p. 4) to the Request and is not at issue in this determination proceeding.
- 19. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174

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Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

20. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.
21. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.
22. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.
23. Rule No. 1 also interprets or makes specific Title 16, CCR, subsection 404(n), which sets out the scope of practice of fire protection engineering.
24. Government Code section 11346.
25. The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:
 - a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)
 - b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

- c. Rules that "[establish] or [fix] rates, prices, or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)
- d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd. (a)(3).)
- e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)
- f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see Del Mar Canning Co. v. Payne (1946) 29 Cal.2d 380, 384 (permittee's agreement to abide by the rules in application may be assumed to have been forced on him by agency as a condition required of all applicants for permits, and in any event should be construed as an agreement to abide by the lawful and valid rules of the commission); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory De-

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terminations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Tande' Montez), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of \$108.

Though the quarterly Determinations Index is not published in the Notice Register, OAL accepts standing orders for Index updates. If a standing order is submitted, OAL will periodically mail out Index updates with an invoice.

26. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez and in the processing of this Request and in the preparation of this Determination.